Supreme Court, U.S.
FILED
JAN 18 2011
OFFICE OF THE CLERK

No. 09-1476

In The Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,

Petitioners,

v.

CHARLES J. GUARNIERI, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR RESPONDENT

CYNTHIA L. POLLICK
363 Laurel Street
Pittston, PA 18640
(570) 654-9675

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u.washington.edu

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

41224
(73)

TABLE OF CONTENTS

	Page
Statement of the Case	1
Summary of Argument	6
Argument	9
I. This Case Is Not Controlled by *Connick* and *McDonald*	9
II. The Petition Clause Protects Petitions That Are Not About Matters of Public Concern	22
III. The Petition Clause Rights of Government Employees Are Not Limited to Protections Within the "Core" of That Clause	35
IV. The Core Rights Protected By The Petition Clause Are Not Limited to Petitions Concerning Matters of Public Concern	40
V. Section 1983 Actions Are Protected By The Petition Clause	49
VI. The Petition Clause Applies to An Arbitral Forum Authorized By The Government To Provide Redress	55
VII. Upholding Guarnieri's Petition Clause Claim Will Not Undermine *Connick*	60
Conclusion	62

TABLE OF AUTHORITIES

Page

CASES

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 9, 25, 50

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964) 24, 25

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 50

Christopher v. Harbury, 536 U.S. 403 (2002) 8, 20, 40

City of Ontario, Cal. v. Quon, 130 S.Ct. 2619 (2010) 35

City of San Diego v. Roe, 543 U.S. 77 (2004) 17

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

District of Columbia v. Heller, 554 U.S. 570 (2008) 43

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) 9, 57

Engquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008) 36, 37, 38

Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979) 22

Garcetti v. Ceballos, 547 U.S. 410 (2006) 17

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 21

Lohman v. Duryea Borough, 2008 WL 2687309 (M.D.Pa. July 1, 2008), 2007 WL 4260943 (M.D.Pa. Nov. 29, 2007) 1

TABLE OF AUTHORITIES – Continued

Page

Marbury v. Madison, 5 U.S. (1 Cranch) 139 (1803) 15

McDonald v. Smith, 472 U.S. 479 (1985) ..... *passim*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 59

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 16

National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) 57

New York Trust Co. v. Eisner, 256 U.S. 345 (1921) 26

Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982) 54

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986) 21

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) 43

Ricks v. Delaware State College, 449 U.S. 250 (1980) 60

San Filippo v. Bongiovanni, 30 F.3d 424 (3d Cir.1994) 39, 48, 60, 61, 62

Schlier v. Rice, 630 F.Supp. 2d 458 (M.D.Pa. 2007) 28

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 16, 50

Thomas v. Collins, 323 U.S. 516 (1945) 7, 15, 16, 24

TABLE OF AUTHORITIES – Continued

Page

United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 24

Wayte v. United States, 470 U.S. 598 (1985) 15

CONSTITUTIONAL PROVISIONS

First Amendment ..... *passim*

Fourth Amendment 13, 14

Fifth Amendment 14

Seventh Amendment 14

Fourteenth Amendment 9, 64

STATUTES

1 Stat. 275, 276 §3 30

28 U.S.C. §1331 54

28 U.S.C. §1343 54

42 Pa.Con.Stat. §7302(b) 56

42 Pa.Con.Stat. §7302(d)(1)(ii) 56

42 Pa.Con.Stat. §7303 56

42 Pa.Con.Stat. §§7307-7310 3

42 U.S.C. §1983 ..... *passim*

Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988 55

TABLE OF AUTHORITIES – Continued

Page

BRIEFS

Brief for United States as Amicus Curiae Supporting Petitioner, *Christopher v. Harbury*, 536 U.S. 403 (2002) 20

OTHER AUTHORITIES

2 Bernard Schwartz, The Bill of Rights: A Documentary History (1971) 26, 51

8 Documentary History of the First Federal Congress 26, 27, 28, 29, 30

Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557 (1999) ..... *passim*

Christine Desan, *Remaking Constitutional Tradition the Margin of the empire: The Creation of Legislative Adjudication in colonial New York*, 16 LAW AND HIST. REV. 257 (1998) 25, 32

Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998) 31, 32

Eric Schnapper, *'Libelous' Petitions for Redress of Grievances – Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989) 44

Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U.L. REV. 739 (1999) 44, 46

TABLE OF AUTHORITIES – Continued

Page

Gordon Wood, The Creation of the American Republic (1969) 31

Gregory Mark, *Right to Petition*, in 5 Encyclopedia of the American Constitution (2d ed. L. Levy and K. Karst eds.) (2000) 47

Gregory Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2163 (1998) 27, 31, 32, 45, 47

Helen E. Vert, et al., Creating the Bill of Rights, The Documentary Record from the First Federal Congress (1991) 51

James Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims against the Government*, 91 NW. U. L. REV. 899 (1997) 32, 44, 52

James S. Hart, Justice Upon Petition: The House of Lords and the Reformation of Justice (1991) 33

Julie Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993) 44, 47, 52

Ludwik Erhlich, Proceedings Against the Crown (1216-1377), in 6 Oxford Studies in Social and Legal History (1921) 33

Magna Carta: Text and Commentary (A. E. Dick Howard ed.) 45

TABLE OF AUTHORITIES – Continued

Page

Norman Smith, "*Shall Make No Law Abridging ...*": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U.CIN.L.REV. 1153 (1986) 33, 44, 46

Petitions, Memorials and Other Documents Submitted for the Consideration of Congress, May 4, 1789 to December 14, 1795, House Committee on Energy and Commerce, 99th Cong., 2d Sess. 27

Ronald Krotoszynski, *The Return of Seditious Libel*, 55 U.C.L.A.L.REV. 1239 (2008) 44

Stephen Higginson, Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV.L.REV. 1111 (1993) 31, 44

Stephen Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986) 31, 32, 44

William Blackstone, Commentaries on the Laws of England (St. George Tucker ed. 1803) 43

STATEMENT OF THE CASE

This litigation concerns respondent Guarnieri's service as Police Chief of the Borough of Duryea, Pennsylvania. Defendants characterize the dispute as a small town inexplicably caught up in protracted and unwarranted litigation, a view they unsuccessfully advanced at trial. The jury verdict instead depicts a band of vindictive local officials who engaged in a protracted vendetta against Guarnieri.[1]

Duryea is a small town with only two full time police officers; the Police Chief spends a substantial portion of his time doing regular police work, rather than administration. Under the applicable borough ordinance, the seven member Borough Council has the authority to hire and fire the Police Chief; supervision of the Chief, on the other hand, is the responsibility of the Borough's Mayor.

---

[1] A jury found in a separate action that the same Borough officials had dismissed another police officer, Nicholas Lohman, because he had assisted Guarnieri with his original grievance. *Lohman v. Duryea Borough*, 2008 WL 2687309 (M.D.Pa. July 1, 2008), 2007 WL 4260943 (M.D.Pa. Nov. 29, 2007).

Defendants assured the district court that both Guarnieri's judgment against the Borough itself, and his judgment "against the individual Defendants for compensatory damages ... are ... covered by insurance." Defendants' Brief in Support of Motion for Stay of Proceedings to Enforce Judgment Pending Disposition of Appeal, 6.

The relationship between the Borough and the Police Chief is governed in part by a collective bargaining agreement[2] between the Borough and the Duryea police officers, who are affiliated with the Fraternal Order of Police. The agreement governing the year 2003 was signed on behalf of the Borough by Ann Dommes, the Council President and one of the defendants in this action. The agreement states that a member of the force may be discharged only for "just cause." (P.Ex. 41 p.21). That agreement provides, in certain circumstances, for a grievance process that can lead to binding arbitration. (*Id.* at pp.19-20).

Guarnieri was initially hired in September 2000. In February 2003 the Borough Council voted to dismiss Guarnieri, an action precipitated in part when Guarnieri rejected a request from the Council Chair that he lobby the mayor to sign a proposed ordinance that was unrelated to the Police Department.[3] Two weeks after his dismissal Guarnieri filed a grievance challenging his termination.[4] The Mayor, who had no power to overturn that dismissal, nonetheless indicated his support for Guarnieri.[5] The dispute

---

[2] P.Ex. 41.

[3] D.Ex. 29 (Arbitration Decision of Dec. 28, 2004), at 11.

[4] The grievance itself, and the subsequent request for arbitration, are not in the record. We have submitted a request to the Clerk, pursuant to Rule 32 of this Court, for leave to file copies of those documents.

[5] D.Ex. 29 at 17.

ultimately was referred for binding arbitration under the terms of the applicable collective bargaining agreement.

The arbitral process had many of the facets of a trial.[6] The dispute was heard by the arbitrator over several days of hearings in August and September 2004; six witnesses were examined and cross-examined and several dozen documents were put in evidence. The Borough was represented by the Borough Solicitor and two additional attorneys from Philadelphia; Guarnieri was represented by counsel provided by the Fraternal Order of Police. In December 2004 the arbitrator issued a detailed 23 page opinion which concluded that the dismissal was improper. The arbitrator ordered that Guarnieri be reinstated with partial back pay. Had the defendants taken no further action against Guarnieri following the arbitration decision, the instant litigation would never have arisen.

The Grievance-Based Retaliation

When Guarnieri returned to work, the Borough Council immediately retaliated against him for having filed the grievance and pursued the successful arbitration. The Council did so by adopting an unprecedented set of "directives" controlling the actions of the Police Chief. Some of the directives had the

---

[6] Many of those formalities were required by state law. 42 Pa.Cons.Stat. §§7307-7310.

effect of limiting how much the Chief could earn; for example, it forbade Guarnieri to work or earn overtime. Others constrained the Chief's ability to do his job; the Chief was ordered, for example, to leave work and "go home" at 3 p.m. each day, an order that applied regardless of whether at that point in time the Chief might be dealing with an emergency, conducting an investigation, or making an arrest.[7] As a result of a subsequent grievance, most of these directives were overturned or modified.

In July 2005, Guarnieri commenced the instant action in federal court, alleging that the disputed directives were intended to retaliate against him for having filed the original 2003 grievance that led to ensuing arbitration and reinstatement. The complaint asserted that the retaliation violated the Petition Clause of the First Amendment. A jury found that the Borough Council had imposed the disputed directives for the purpose of retaliating against Guarnieri because he had pursued the earlier grievance and arbitration regarding his 2003 dismissal. The jury awarded Guarnieri both compensatory damages and punitive damages.

---

[7] In a number of instances a directive was disputed because it provided that the Police Chief would be personally responsible for any violation of a rule by one of his subordinates, a form of strict liability which Guarnieri claimed was not imposed on other department heads. D.Ex. 18 (P.Ex. F), at 19, 23. Had those directives remained in place, it would have been easier for the Council to again dismiss Guarnieri.

The Lawsuit-Based Retaliation

While Guarnieri's federal lawsuit was pending in the district court, the Borough Council refused to pay Guarnieri for overtime hours he had worked. Guarnieri complained about the denial to the Wage and Hour Division of the United States Department of Labor, which concluded that the denial of overtime pay violated the Fair Labor Standards Act. The Borough entered into a written agreement with the Department of Labor in which it promised to pay Guarnieri $338.53 for the overtime he had worked. The Borough never paid Guarnieri that $338.53. The Borough conditioned payment of the promised amount on Guarnieri signing a waiver that would have compromised his other legal claims. Guarnieri refused to sign the waiver and proceeded with this litigation.

In December 2006 Guarnieri amended his federal complaint to add a second retaliation claim. The amended complaint alleged that the defendants' refusal to pay the overtime was a reprisal for Guarnieri's filing the original federal lawsuit. The jury sustained this second allegation of retaliation, and awarded Guarnieri $358 in compensatory damages, as well as punitive damages.

SUMMARY OF ARGUMENT

I. This case is not controlled by the holding in *McDonald v. Smith*, 472 U.S. 479 (1985), that there is no basis "for granting greater constitutional protection to statements made in a petition ... than other First Amendment expressions." 472 U.S. at 485. The complaint in this action did not allege that the retaliation against Guarnieri had occurred because of any statement in his grievance or his federal complaint; rather, the complaint asserted that he had been retaliated against "for petitioning the government." (J.App. 95). The defendants did not claim that they had acted against Guarnieri because of any such statement.

The gravamen of Guarnieri's claim was that the Borough retaliated against him to punish him for having sought redress, first by utilizing a grievance process and arbitration to get his job back, and second by filing a section 1983 action to seek damages for post-reinstatement reprisals. Defendants' argument for a narrow construction of the petition clause rests on the burdens which they assert are imposed by arbitration and litigation as such.

The legal issue in this case is thus essentially the opposite of the issue in *McDonald v. Smith*, 472 U.S. 479 (1985). In that case Smith did not dispute McDonald's petition clause right to oppose Smith's appointment to federal office; he argued only that the petition clause did not protect "intentional and reckless falsehoods" made in statements in McDonald's

letters. 472 U.S. at 484. Here the defendants do not ground their actions or objections on the content of Guarnieri's grievance or original federal complaint; they contend, rather, that Guarnieri's very act of petitioning is not protected by the Constitution.

II. The petition clause protects petitioning that deals with matters that are not of public concern. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured ... are not solely religious or political causes." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

When the petition clause was adopted, the common understanding of Americans was that the right to petition included efforts to obtain redress for private problems. The overwhelming majority of petitions received and considered by the First Congress presented private claims. Many of those petitions concerned claims for redress by current or past employees of the national government. The Clerk of this Court petitioned praying for compensation for his services and expenses. Other federal employees petitioned for wages, raises, and moving expenses. The only two private bills enacted in the first session of the First Congress were to provide compensation to former employees of the national government. Petitions to the colonial assemblies similarly dealt primarily with private matters, including petitions from then serving colonial employees. The Congress and state legislatures which approved the petition clause

assuredly understood it to protect the very types of petition with which they were most familiar.

III. The petition clause rights of public employees should not be limited to a "core" of the petition clause. The limitation on free speech claims established by *Connick v. Myers*, 461 U.S. 138 (1983) was necessary to prevent every employment decision from raising constitutional issues; almost all such employment decisions rest in part on statements made by public employees. Actions that constitute petitioning, on the other hand, are considerably less common, and can be addressed on an individual basis without the difficulties at issue in *Connick*.

IV. The core purpose of the petition clause is to enable petitioners to seek redress, not to facilitate any expression that may be incidental to those efforts. "[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). Thus even if petition clause claims of public employees were limited to the core of the petition clause, that clause would still protect petitions by public employees on matters not of public concern.

V. Guarnieri's amended complaint alleged that the defendants had retaliated against him for having filed his original section 1983 action. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress

of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). Defendants object that the redress mechanism provided by section 1983 is unduly burdensome, and complain in particular that section 1983 provides for individual liability and awards of counsel fees. But it was for Congress to decide what form of remedial mechanism to provide for violations of federal rights; the provisions of section 1983 are well within the authority of Congress under section 5 of the Fourteenth Amendment.

VI. Guarnieri's grievance, which led to the resulting arbitration proceeding, was a petition for redress of grievances. The arbitrator was empowered by the Borough to make a "final and binding" decision as to whether Duryea would restore Guarnieri to the position from which he had been dismissed. That delegation of authority to select a Borough official rendered the arbitrator a government actor for constitutional purposes. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

ARGUMENT

I. THIS CASE IS NOT CONTROLLED BY *CONNICK* AND *MCDONALD*

(1) Petitioners advance a straightforward argument. *Connick* held that statements by government employees regarding matters not of public concern are not protected by the free speech clause. *McDonald* held that a statement in a petition is not entitled to

more protection under the petition clause than the same statement would enjoy under the free speech clause. Thus, defendants reason, a public employee cannot obtain protection for a statement about an employment matter not of public concern "simply because [the] employee chooses to state his complaint in a petition." (P.Br. 13). On this view there is no need for the Court even to consider the text, historical origins or original meaning of the petition clause.

But this is not, like *McDonald*, a case about whether the petition clause protects a particular "statement" contained in a petition. The complaint in this action alleged that Guarnieri had been retaliated against "for petitioning the government." (J.App. 95; see *id.* at 97 (Guarnieri "was retaliated [against] for filing grievances"), not because he made any statement in connection with his grievance or original federal claim. The jury instructions permitted the jury to find for the plaintiff only based on retaliation for filing his 2003 grievance or his 2005 complaint, not based on retaliation for any statement in the grievance or complaint.[5] Conversely, the defendants did not claim that they had taken the assertedly retaliatory actions because of any such statement; the defendants never asserted that any statement contained in the grievance or original complaint was

[5] Tr. of April 17, 2008, at 61-62.

false, defamatory, disruptive, insubordinate, or in any other way objectionable."[9]

The factual issue that was presented at trial was whether petitioning as such – the act of requesting redress in the grievance or first federal complaint – had prompted the defendants to retaliate against Guarnieri. The trial judge explained to the jury that Guarnieri "claims that the retaliation occurred because he filed a grievance under the collective bargaining agreement .... He also claims that retaliation occurred because he filed this particular lawsuit."[10] The gravamen of Guarnieri's claim was that the defendants decided to retaliate against him because the filing of the grievance and complaint initiated an arbitration and litigation process, respectively, whose occurrence and outcome the defendants resented.

The legal issue decided by the courts below was limited to this claim. The district court held that the assertedly protected conduct in this case was the "*filing* [of] non-sham lawsuits, grievances and other petitions directed at the government or its officials. The *filing* of such a petition is protected without regard to whether the petition addresses a matter of public concern." (Pet.App. 27a) (emphasis added). Similarly, the court of appeals noted that Guarnieri's

---

[9] The grievance contained only the conclusory allegation that "[t]his discharge was without just cause as required by Article 17 of the collective bargaining agreement."

[10] Tr. of April 17, 2008, at p. 59.

claim was that he had been retaliated against "for his having filed and won his 2003 grievance." (Pet.App. 5a). The defendants never argued in the lower courts, and thus those courts had no occasion to consider, whether Guarnieri might have been acted against because of some statement contained in the grievance or complaint, or in the proceedings that followed.

In this Court defendants argue that Guarnieri's efforts to obtain redress should be denied constitutional protection, not because they involved or tacitly communicated any particular statement, but because those efforts, unlike mere speech, triggered an arbitral or legal proceeding. "[P]etitions ... are likely to be more costly and disruptive than an employee's mere comments about workplace affairs." (Pet.Br. 13). The arbitration, defendants object, caused the Borough to incur litigation expenses; the lawsuit, they complain, resulted in a substantial monetary award to Guarnieri. It is only to the consequences of petitioning as such, not to any statement contained in the grievance or complaint, that the defendants direct their objections.

The constitutional argument thus advanced by the defendants in this case is essentially the opposite of the contention of the plaintiff in *McDonald v. Smith*. In *McDonald* Smith brought a libel action against an individual who had written several letters to the President opposing Smith's appointment to federal office. Smith did not challenge McDonald's constitutional right to oppose to the appointment; Smith argued only that certain statements contained

in the letters were false and malicious and thus not constitutionally protected. In the instant case, on the other hand, the defendants do not rely on or object to any statements made in the grievance or complaint to justify their actions against Guarnieri; rather, they insist that Guarnieri simply had no constitutionally protected right to file the grievance and section 1983 actions.

The particular retaliatory intent alleged (and proven) by Guarnieri is thus of controlling importance. Had Guarnieri alleged that the defendants retaliated against him because of a particular statement in the grievance or complaint, that would present a different issue. But Guarnieri asserted that it was the very act of petitioning, of seeking redress, that was the reason for the retaliatory acts. Petitioning, of course, ordinarily involves a degree of expression, but that is true of the exercise of many constitutional rights. Where that occurs the underlying constitutional right and claim remain distinct from any expression that may have occurred, incidentally or otherwise. If the Duryea Council President had demanded permission to search Guarnieri's home, and Guarnieri had responded "no" and then been fired because of that refusal, the constitutionality of that dismissal would turn on the application of the Fourth Amendment, not of the free speech clause.[11]

---

[11] Similarly, if Guarnieri had been fired because he was overheard saying a prayer about an employment matter that was not of public concern, such as praying for a raise, the constitutionality of that dismissal would be governed by the free

(Continued on following page)

Perhaps such a refusal, in addition to preserving Guarnieri's privacy, could also convey some message, such as indicating to the frustrated searcher that Guarnieri believed his home was indeed his castle. But the existence of any such tacit message would not somehow eliminate Guarnieri's Fourth Amendment rights and limit him to defending his refusal under the free speech clause.

Connick is not controlling here because that decision held only that a public concern requirement applies to constitutional claims that a statement by a public employee is protected by the free speech clause.[12] *Connick* simply did not address whether a similar limitation should be imposed on public employees asserting constitutional claims under the petition clause, the free exercise clause, the establishment clause, the assembly clause, or the Fourth, Fifth or Seventh Amendments simply because the exercise of those rights also involved some form of expression.

---

exercise clause, not the free speech clause. Just as petitions are not merely free speech directed to the government, prayer is not merely free speech directed to a divine being.

[12] *Connick* cannot fairly be read to hold even that all free speech claims by public employees are subject to the public concern requirement. The free speech clause includes, at least ordinarily, a right to attend a trial and related judicial proceedings. *Connick* does not hold that a public employee could be fired for having attended (during non-working hours) a trial related to employment but not involving a matter of public concern.

Defendants argue that a constitutional principle of "parity" requires that the petition clause be interpreted to provide only protections that are also found in the free speech clause; if the petition clause embodied any additional protections, they urge, there would be a "hierarchy" of constitutional rights in which the petition clause would outrank the free speech clause. (Pet.Br. 12, 14-16, 22). On this view the petition clause ought to be read so narrowly that it is entirely redundant, and merely reiterates constitutional protections that are already afforded by the free speech clause. The normal rule of construction, however, is precisely to the contrary; constitutional and statutory provisions are ordinarily interpreted so as to avoid, not achieve, such redundancy. "[I]t cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Although this Court has noted that the free speech and petition clauses may often overlap, it has never suggested that they must invariably be construed alike. *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (two clauses are "not identical"); *Wayte v. United States*, 470 U.S. 598, 611 n.11 (1985) (two clauses are "generally subject to the same constitutional analysis").

In several respects the free speech clause is clearly broader than the petition clause. The free speech clause applies, as the petition clause does not, to expression (such as at least most music and dance) that has nothing to do with the government, to

expression not directed to the government at all (such as private conversations), and to expression that does not seek any form of government redress. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). Since the free speech clause is in some respects broader than the petition clause, it is impossible to understand what constitutional principle would be violated if the opposite were also true.

Petitioners rely on the statement in *Thomas* that four constitutional rights – freedom of speech, freedom of assembly, freedom of the press, and the right to petition – are "inseparable" and "cognate rights." (Pet.Br. 16-17). In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982), the Court described the right of association in the same terms. It is difficult to understand how a petitioners' proposed rule of parity could be applied to all five of these constitutional rights, in a way that assured that no single right ever provided constitutional protections unavailable under the other four. The fact that the five rights are cognate and inseparable does not mean that they all must be interpreted to have identical meaning.

(2) The practical and legal issues raised by speech and by petitioning are sufficiently different that the standard governing free speech cases should not be presumed to apply as well to petition clause claims, or vice versa.

First, the rule in *Connick* is ordinarily invoked by public employers to address and control statements that were actually made at work. Workplace remarks

implicate directly the ability of a public employer to regulate what occurs on the job.[13] *Garcetti v. Ceballos*, 547 U.S. 410, 434 (2006) (Souter, J., dissenting) ("government needs civility in the workplace"). *Connick* enables an employer to use the threat of dismissal or other discipline to control such workplace behavior and to regulate this aspect of the workplace as it does all others.[14]

The actions at issue in petition cases, on the other hand, often if not ordinarily take place outside the workplace,[15] at agencies or institutions which the public employer does not, and in some instances constitutionally could not, control. Defendants candidly

---

[13] Although *Connick* has been applied to expression outside the workplace, that has been in situations where an employer had "legitimate and substantial interests that were compromised by [the] speech." *City of San Diego v. Roe*, 543 U.S. 77, 81 (2004); *see id.* ("speech was detrimental to [the employer]" and "harmful to the proper functioning of the police force").

[14] On the other hand, a public employer ordinarily does not care about, or even know about, statements made outside the workplace. Most employees at times complain to their friends or families about their boss; only in an Orwellian world would a public employer seek to monitor, investigate and discipline workers for such statements.

[15] In the instant case Guarnieri was not even a Borough employee when he filed the grievance that led to much of the retaliation.

explain that the burdens of petitioning to which they object are the costs and consequences of the proceedings, such as lawsuits and arbitration, proceedings which necessarily occur outside the workplace. The efforts of a public employer to control or prevent such legal processes obviously raise very different issues than steps to control workplace activities. It is one thing for the Duryea Council to regulate, through threat of discipline, statements made at the Borough Police Department; it is quite another matter for the Council to punish a Borough employee for the purpose of controlling what that employee – or his attorney – do at a federal courthouse.

Second, *Connick* protects a public employer's "broad discretion in responding to employees' purely work-related complaints." (Pet.Br. 13). Thus when an employee voices disagreement about the employer's actions, the employer needs considerable leeway in deciding whether to respond to that disagreement, to ignore it, or to discipline the employee. Permitting a public employer to punish such complaints assures that the employer can prevent internal interference with its lawful, if perhaps controversial, activities. But when a public employee seeks redress from a court or an arbitrator, the employee is asserting that an action of that employer, rather than being a matter of discretion, was unlawful, unconstitutional, or in violation of a contractual agreement, and is asking the court or arbitrator to stop or redress that action. It is, of course, inconvenient when government officials are ordered by such outside authorities to

abandon or correct a course of action found to be illegal, but that is the very essence of the rule of law. The use of disciplinary measures under *Connick* to punish workplace remarks is categorically different from the use of such measures to obstruct the due course of justice in a federal or state court or other adjudicatory body.

Third, if as defendants contend the petition clause is inapplicable to petitions on matters not of public concern, that limitation would necessarily apply to petitions filed with the United States Congress by a federal employee. The Solicitor General, in its brief supporting defendants, explains that he does so because of the interest of the United States as the nation's largest employer. (U.S.Br. 1). The Solicitor General does not, however, contend that his position advances the equally important interest of the House and Senate in receiving complaints from employees of the Executive branch. As we explain below, Congress from its very inception received and acted on petitions from current and former employees of the national government raising work-related matters that were not of public concern. Today congressional offices routinely receive and seek to redress such complaints from federal workers. Often congressional attention leads only to the resolution of an individual dispute; sometimes the pattern of such complaints, each in isolation of no seeming public import, convinces a member of the House or Senate that there is a need for legislation or congressional hearings. If the petition clause did not protect the federal workers

who write or call their Representative or Senator about a matter not of public importance, agency officials would be able to stifle such complaints.

Fourth, although the content of speech subject to *Connick* is immediately known, and the existence vel non of constitutional protection is thus foreseeable by speaker and employer alike, whether a petition will involve a matter of public concern may not be knowable when the petitioner initially seeks redress. A petition often is not, like a statement, a one-time self-defining event; a petition frequently sets in motion a process which over time involves issues which could not have been foreseen at the outset.[16] In the instant case, when Guarnieri initially filed the grievance he could not have known whether Borough officials might seek to justify his dismissal by asserting that he had engaged in some type of misconduct that would be of public concern. Conversely, at the beginning of the grievance process the defendants could not have known what factual contentions Guarnieri would advance; perhaps he could assert that he had been fired because of his race or religion.

The filing of Guarnieri's original federal complaint, which led to the lawsuit-based retaliation claim, raised a similar problem. Defendants maintain

---

[16] Brief for the United States as Amicus Curiae Supporting Petitioner, *Christopher v. Harburg*, 536 U.S. 403 (2002), No. 01-394, at 20 ("The right of access to the courts is functionally a right to judicial process.").

that the original federal action (which triggered the retaliatory denial of overtime) was not a matter of public concern. On the other hand, in a development likely unforeseen at the time it was filed, that lawsuit came to highlight the circuit conflict regarding the constitutional rights of public employees under the petition clause. In its petition for certiorari defendants persuasively argued that "this case presents ... a recurring and important issue of constitutional law." (Pet. 25) (capitalization omitted). Whatever its outcome, this Court's decision in the instant case will be of national significance. In *Connick* whether Ms. Myers' own expression was of public importance could not have been affected by the subsequent litigation; but whether an individual's grievance or lawsuit is of public importance may indeed turn on later events.

The filing of a lawsuit may also implicate public concern in a manner that is unrelated to the evolving subject matter of the action. This Court has repeatedly held that trials, as well as other judicial proceedings, are inherently matters of legitimate and constitutionally protected public interest; the public and the press thus ordinarily have a First Amendment right to attend those proceedings.[17] That constitutional

---

[17] *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8-13 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982). Although in this Court that issue has been considered only in the context of criminal trials, the Court has emphasized that the common law tradition of public trials

(Continued on following page)

right has never depended on a showing that the allegations in the case affected a large number of people, were against a public figure or had attracted substantial media attention. The federal trial that occurred in this action in April 2008 was in that sense necessarily a matter of public concern. The oral argument to be heard in this Court on March 21, 2011, certainly will be. It is difficult to understand how the public concern requirement could be applied to a federal or state lawsuit in which such developments were at least a possibility when it was first commenced. Whatever the solution to that question, this assuredly is not a problem raised or addressed by *Connick*.

II. THE PETITION CLAUSE PROTECTS PETITIONS THAT ARE NOT ABOUT MATTERS OF PUBLIC CONCERN

(1) The petition clause guarantees the right "to petition the Government for a redress of grievances." Nothing in the text of the petition clause in any way suggests that the availability of that constitutional protection could turn on the subject matter of the petition. To the contrary, the very structure of the petition clause is inconsistent with any such limitation.

---

extended to civil as well as criminal cases. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384, 386 n.15 (1979).

The terms of the petition clause require a person invoking the constitutional guarantee to meet three, and only three, requirements. The petitioner must show that he or she sought "redress," that the request for redress was grounded on a "grievance," and that the petition was directed to "the Government." None of the elements of a petition claim is in any way concerned with or limited by the nature or importance, however assessed, of the subject matter of the petition. If a dismissed employee seeks reinstatement to his or her former job, the requested relief would be "redress" regardless of the grounds for that request. Where a government worker asserts that he or she has been treated in a manner that violates a statute, regulation, constitutional provision, contract term, or the common law, that assertion is a "grievance" regardless of whether or not members of the public happen to sympathize with or care about that type of claim.

The very specificity of the petition clause precludes adding yet a fourth element, such as a requirement that a petitioner who has been subject to reprisals also demonstrate that the petition dealt with a matter of public concern. Such an additional requirement would by its very nature exclude an entire class of meritorious grievances and wronged petitioners. Nothing in the text of the petition clause supports the surprising contention that whether an individual is protected in his or her request for redress turns on whether his claim is of interest to others, or on whether the petitioner himself is a

public figure. Under defendants' proposed standard, the grievance and lawsuit in this case would have been protected by the petition clause if they had been filed by the controversial Sheriff of Maricopa County, Arizona. Surely a lawsuit or grievance about the dismissal of the Director of the FBI would be a matter of public concern. The same petitions are no less deserving of constitutional protection if they are filed by a less well known former Police Chief of an out-of-the-way small town. The petition clause accords the right to seek redress in equal measure to every individual, no matter how obscure the nature of the grievance or how modest his or her circumstances.

The decisions of this Court have repeatedly rejected the type of distinction advocated by defendants. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured ... are not solely religious or political causes." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). In *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), the Court held that the petition clause protected the right of the union in question to provide legal assistance to its members in pursuing claims under the state workmens' compensation act, insisting that the union had the right to do so even though "[t]he litigation in question is, of course, not bound up with political matters of acute social moment." 389 U.S. at 223. In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), the majority expressly rejected the contention that the access to the courts protected by

the petition clause is limited to matters of general public importance. *Compare* 377 U.S. at 10 (Clark, J., dissenting) ("Personal injury litigation is not a form of political expression ... No guaranteed civil right is involved here") *with id.* at 8 (majority opinion) ("The right to petition the courts cannot be so handicapped."); see *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (petition clause applies to libel action).

(2) When the petition clause was adopted, the common understanding of Americans was that the right to petition included efforts to obtain redress for private problems. "[I]n post-revolutionary America, a petition to the legislature was viewed as a fundamental right and served as a means of securing redress of private grievances." Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIOST.L.J. 557, 611 (1999). "[M]any early Americans would have viewed the right to petition the legislature as including the right to present private disputes for resolution by the legislature." *Id.* at 607. "The import of [colonial era] petitioning, both for public purposes and for the redress of private claims, explains its sanctification as a 'right' in the federal Constitution." Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV.L.REV. 1381, 1487 n.520 (1998).

The records of the First Congress provide an unusually clear picture of what types of complaints the framers of the First Amendment actually understood

were the subject of petitioning. The First Congress received several hundred petitions, and was considering many of them at the same time it was framing the Bill of Rights. The members of the Congress would have been quite familiar with the contents of the petitions themselves. Every petition was read aloud on the floor of the House and the Senate, often by the Representative or Senator from whose district or state the petition had originated. In the House each petition was considered by a committee, which was usually a small ad hoc group.[18] The subject matter of those key early petitions is a compelling indication of what the framers thought petitioning was about and of the types of petitions that the Congress intended to protect. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).[19]

"[T]he overwhelming majority of First Congress petitions presented private claims." 8 Documentary History of the First Federal Congress 1789-1791

---

[18] 8 Documentary History of the First Federal Congress 1789-1791 (Petition Histories and Nonlegislative Official Documents) (K. Bowling, W. DiGiacomantonio and C. Bickford, eds.) xvi-xvii (1998) (hereinafter cited as "Documentary History").

[19] Madison's initial proposal to protect the rights to petition and assembly linked the latter, but not the former, to questions of concern to the public. "The people shall not be restrained from peaceably assembling and consulting *for their common good*; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (emphasis added).

(Petition Histories and Nonlegislative Official Documents) (K. Bowling, W. DiGiacomantonio and C. Bickford, eds.) xviii (1998) (hereinafter cited as "Documentary History"); see *id.* at xvii ("[m]ost petitions dealt with local or private grievances best understood by the petitioner's own Representative."). "A petition ... during the period [1789-1795] usually dealt with the satisfaction of a private claim." Petitions, Memorials and Other Documents Submitted for the Consideration of Congress, May 4, 1789 to December 14, 1795, House Committee on Energy and Commerce, 99th Cong., 2d Sess., 1 (hereinafter cited as "Petitions, Memorials and Other Documents"). "The federal government received many petitions ... on purely private matters, especially if the records of the first few Congresses is indicative." Gregory Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2163, 2227 (1998).

A large portion of the petitions to the First Congress, probably a plurality, were from past or current employees of the national government and concerned matters related to their employment.[20] The only

---

[20] Another large group of petitions sought payment for goods or services that had been provided to the Continental Army or the Confederation. 7 Documentary History 35-102. In the instant case defendants object to the application of the petition clause to petitions to government contractors. (Pet. Br. 49) (citing, as an example of a "petty dispute" to which the petition clause should not apply, a "complaint for the recovery of

(Continued on following page)

private acts adopted in the First Session of the First Congress dealt with just such claims. One awarded a Baron Glaubeck seventeen months of pay for his service as a captain in the Continental Army;[21] the other awarded six months of pay to John White, and to his clerks, for his service as a commissioner to settle the accounts between the United States and the states of Pennsylvania, Delaware and Maryland.[22] These petitions were considered and acted upon during the summer of 1789, the same time that Congress framed the Bill of Rights.

Many petitions sought compensation for previous periods of government employment; those petitions were from petitioners who had never been paid and from petitioners who asserted that their prior compensation was insufficient. Thomas Barclay petitioned for unpaid salary and expenses in connection with his service as the American vice consul and then consul in Paris.[23] William Peery sought compensation for his service in negotiating the Treaty of Hopewell with the Cherokee Nation.[24] Alexander Hanson requested payment for his service on a court of arbitration to resolve a boundary dispute between

---

unpaid towing services invoices, *Schlier v. Rice*, 630 F.Supp.2d 458 (M.D.Pa. 2007)").

[21] 7 Documentary History 198-201, 6 Stat. 1.

[22] 8 Documentary History 123-26; 6 Stat. 1.

[23] 8 Documentary History 119-23. Congress ultimately reimbursed Barclay's estate in 1808. 6 Stat. 72.

[24] *Id.* at 102-03.

Georgia and South Carolina.[25] Other petitions from former civilian employees sought reimbursement for expenses.[26] Petitions were also submitted by veterans of the Continental Army.[27]

The most celebrated of these petitions for compensation was from Baron Frederick von Steuben, who had volunteered for service in the Continental Army and became General Washington's Inspector General. Von Steuben had served without pay for seven years. 8 Documentary History 212. Congress awarded von Steuben an annuity of $2500 "for the ... services ... rendered to the United States." (6 Stat. 2, ch. 16). The First Congress also received a substantial number of petitions from men who had been injured while serving in the Continental Army. 8 Documentary History 332-35. These petitions are analogous to claims for workmen's compensation, which defendants insist ought not be protected by the petition clause (Pet.Br. 49) (citing with disapproval *Diana v. Oliphant*, 2007 WL 3491856 (M.D.Pa. Nov. 13, 2007)).

---

[25] 8 Documentary History 110-13. Other petitions from former civilian employees are set out at *id.* 7-34, 96-119.

[26] *Id.* 8 Documentary History 90 (petition of former steward of the household of the presidents of the confederation congress for "expenditures for marketing and for sundry expenses"), 91-92 (petition of former Commissioner of the Continental Loan Office seeking reimbursement for "firewood & candles" and the salaries of clerks in his employ), 98 (petition of William Mumford).

[27] *Id.* at 164-88.

The First Congress also received petitions from then serving federal employees. John Tucker, then the first Clerk of this Court, filed a petition "praying for compensation for his past services and expenses, as clerk to the [S]upreme [C]ourt of the United States." 8 Documentary History 189.[28] The Assistant Doorkeeper of the House of Representatives successfully petitioned for an increase in compensation. Petitions, Memorials and Other Documents 24. Roger Alden, who was responsible for keeping the records of the earlier Confederation Congress and the great seal of the federal Union, petitioned for compensation for his services and for the expenses of his office. 8 Documentary History 132-33. Winthrop Sargent, the Secretary of the Western Territory, petitioned for additional expenses. *Id.* at 134-35. The House received petitions seeking raises from the clerks in the Office of the Paymaster General and for certain "clerks in public offices" in the nation's capital. 8 Documentary History 128-30. Several clerks who had relocated from New York City to Philadelphia sought for reimbursement of their moving expenses. *Id.* at 131-32. The former postmistress of Baltimore petitioned Congress to overturn her dismissal by the Postmaster General. *Id.* at 231-39.

The petitions received by the First Congress were similar to those that had been addressed by the

---

[28] The First Congress did not act on the petition. The Second Congress enacted legislation providing compensation for the Clerk. 1 Stat. 275, 276 §3.

colonial assemblies. "In the earliest colonial American governments, ... [m]ost petitions involved private disputes." Stephen Higginson, Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV.L.REV. 1111, 1117 (1993). In the colonies petitioning was "a method whereby ... individuals could seek employment of public power to redress private wrongs." Mark, 66 FORDHAML.REV. at 2182. "[T]he right to petition guaranteed access to a legislature that had enormous power over ... private grievances." Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV.L.REV. 1381, 1387 n.15 (1998).

"From the beginning, the primary responsibility of colonial assemblies was the settlement of private disputes raised by petitions." Stephen Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALEL.J. 142, 145 (1986). "[T]he assemblies in the eighteenth century ... constantly heard private petitions, which often were only the complaints of one individual or group against another, and made judgments on these complaints." Gordon Wood, The Creation of the American Republic 1776-1787, 154-55 (1969). "The Connecticut General Assembly usually acted on more individual causes than on legislation. Virginia and Maryland had similar experiences." Andrews, 60 OHIOST.L.J. at 605-06 (footnotes omitted).

The petitions considered by the colonial assemblies included submissions by government employees raising employment-related problems. In New York

both colonial commissioners and British soldiers stationed in the colony petitioned the Assembly for compensation;[29] even the Doorkeeper, Printer and Clerk of the Assembly filed a petition asking to be paid their salaries.[30] In Connecticut "the governor's own guard had to petition the Assembly for their arms and expenses." Higginson, 96 YALE L.J. at 152. Other petitions concerned such purely private matters as divorces, debt actions, estate distributions, and requests for relief from creditors.[31]

The origins of petitioning in England clearly encompassed petitions on private matters. Prior to Magna Carta the use of petitions appears to have been largely reserved for "property disputes between individuals." Mark, 66 FORDHAM L. REV. at 2164 n.26. "The ability to apply for redress of grievances was, at least in its earliest stages, clearly not a tool for general grievances." *Id.* at 2164. In the fourteenth century petitions commonly asked "for relief of a judicial nature on private matters." Andrews, 60 OHIO ST. L.J.

---

[29] Desan, 111 HARV. L. REV. at 1431 and n.218, 1465 nn.386-87.

[30] Desan, *Remaking Constitutional Traditional the Margin of the Empire: The Creation of Legislative Adjudication in Colonial New York*, 16 LAW AND HIST. REV. 257, 298 n.104 (1998).

[31] James Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims against the Government*, 91 NW. U.L. REV. 899, 932 (1997); Higginson, 96 YALE L.J. at 145; Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

at 597-98. During the reign of Edward I petitions often concerned "disputes relating to private parties only."[32] In the seventeenth century "[t]he business of Parliaments became the business of rendering decisions in private disputes between party and party," including "relatively mundane disputes over real property, debt, inheritance, wages, contracts and a variety of domestic matters." James S. Hart, Justice Upon Petition: The House of Lords and the Reformation of Justice 1621-1675, 3-5 (1991). "Before the late Eighteenth Century, parliament received few petitions on state affairs." Norman Smith, "*Shall Make No Law Abridging ...* ": *An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U.CIN.L.REV. 1153, 1167 n.82 (1986).

As petitioning developed in England, "[i]t was the collective right to petition, not the individual right, that was uncertain." Andrews, 60 OHIOST.L.J. at 628. In 1661 Parliament adopted the Act Against Tumultuous Petitioning, which required that petitioners obtain prior approval from certain local authorities before soliciting signatures of more than twenty persons on a petition "for alteration of matters established by law in church or state";[33] no such limitation applied to petitions on other matters. The preface to the Act explained that "violations of the public peace"

---

[32] Ludwik Erhlich, Proceedings Against the Crown (1216-1377), in 6 Oxford Studies in Social and Legal History 96 (1921).

[33] 13 Car. 2, c. 5 §1, *reprinted in* 5 Statutes of the Realm 308 (spelling and capitalization modernized).

had been triggered by petitions signed by large numbers of individuals seeking "redress of pretended grievance in Church or State, or other public concernments."[34] At the 1688 trial of the *Seven Bishops Case*, which played a pivotal role in both the right to petition under English law and the Glorious Revolution of 1689, the most conservative member of the court suggested that the right to petition extended only to private matters.[35]

This long history of redressing petitions on private matters, dating from centuries before the Revolution and very much part of the daily activity of the First Congress, leaves no doubt that the framers of the petition clause would assuredly have understood and intended that such petitions were to enjoy constitutional protection.

---

[34] *Id.*

[35] 12 Howell St. Tr. at 427-28 (Allybone, J.):

> It is the business of the government to manage matters relating to the government; it is the business of subjects to mind only their own properties and interests. If my interest is not shaken, what have I to do with matters of government?

Id. at 428-29 (Allybone, J.):

> I do agree, that every man may petition the government, or the king, in a matter that relates to his own private interest.

III. THE PETITION CLAUSE RIGHTS OF GOVERNMENT EMPLOYEES ARE NOT LIMITED TO PROTECTIONS WITHIN THE "CORE" OF THAT CLAUSE

Few constitutional rights are absolute. The invocation of a constitutional guarantee often requires the courts to balance the extent of the constitutional interest at issue against the importance of any government stake in the action that impinges on those interests. Where the constitutional interest is more modest, it can be outweighed by a lesser showing of governmental justification. But so long as the challenged action impinges in any way on the constitutional right in question, the government must show that some legitimate public purpose outweighs that constitutional right.

That balancing approach is the methodology normally utilized by this Court in resolving constitutional claims by government employees. Thus in *City of Ontario, Cal. v. Quon*, 130 S.Ct. 2619 (2010), the Court in upholding the reasonableness of the search of Quon's text messages explained that "the extent of a[ny reasonable] expectation [of privacy] is relevant to assessing whether the search was too intrusive." 130 S.Ct. at 2631.

In the instant case, however, defendants urge the Court to discard that traditional balancing approach, and instead to delineate a category of non-"core" petitioning from which public employees can be forbidden to engage. Defendants do not contend that

non-core petitions are outside of the scope of the petition clause. But where public employees are involved, they insist, the petition clause protects only core petitions, those regarding matters of public concern. Petitions on other matters can be prohibited, and can be the subject of reprisals, without any showing that the petition in question adversely affected any identifiable government interest. An employee's petition on a matter of public concern is protected, even if the amount claimed is small and the chances of success are slim. But a public employee's petition on any other matter is unprotected, even if the worker's unquestioned damages are considerable and the merits of the petition are undisputed.

Neither *Connick* nor *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008), warrant such a rigid bifurcation of the petition clause. The decision in *Connick* to limit free speech rights of government employees to expression on matters of public concern rested on a special problem unique to freedom of speech. As the Court noted in *Connick*, virtually all employment decisions involve some sort of statements by the worker affected. Thus if the traditional constitutional balancing test were applied whenever any type of speech was a factor, almost all government personnel decisions would give rise to constitutional claims. "[G]overnment offices could not function if *every* employment decision became a constitutional matter." 461 U.S. at 143 (emphasis

added). "To presume that *all* matters which transpire within a government office are of public concern would mean that virtually every remark ... would plant the seed of a constitutional case." 461 U.S. at 149 (emphasis added).

In *Engquist* a similar practical concern supported the Court's decision that government employees may not bring class-of-one claims under the Equal Protection Clause.

> If, as Engquist suggests, plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim. Indeed, an allegation of arbitrary differential treatment could be made in *nearly every* instance of an assertedly wrongful employment action ... on the theory that other employees were not treated wrongfully.

553 U.S. at 607-08 (emphasis added). *Engquist*, however, did not hold that this problem alone would have warranted barring class-of-one claims by public employees. The Court also emphasized that such claims were "simply a poor fit in the public employment context" because employment decisions typically involve a high degree of subjective individualized determinations quite unlike the situation for which

the class-of-one doctrine had been framed. 553 U.S. at 605.

Engquist itself makes clear that whether or not a particular constitutional claim falls at the core of the constitutional right involved is not by itself dispositive; a claim outside (or further from) that core is not irrelevant, but merely more easily overcome by a showing of governmental interest.

> Our precedent in the public employee context therefore establishes two main principles: First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be *balanced* against the realities of the workplace. Second, in striking the appropriate *balance*, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer.

553 U.S. at 600 (emphasis added). The principle that claims outside the basic concerns of a constitutional provision "*can* more readily give way to the requirements of the government as employer" does not mean that such claims *must* fail in every case, without any showing that recognition of that claim would interfere with some identified requirement of the employer.

Petitions do not pose the same threat as speech claims and class-of-one claims of turning essentially every employment decision into a constitutional

dispute. Although all government employees constantly make work-related statements on matters that are not of public concern, and although almost all of those employees are the subjects of repeated individualized decisionmaking, it is far less common for those workers to be involved in lawsuits, the filing of grievances, or similar petitioning. Defendants acknowledge that "many everyday workplace complaints do not seek to 'invoke[ ] a mechanism for redress of grievances against the government.'" (Reply Brief for Petitioners 4 (quoting *San Filippo v. Bongiovanni*, 30 F.3d 424, 439 n.18 (3d Cir.1994)). "It is also true that most office mails, letters, oral remarks, and phone calls do not." (Reply Brief for Petitioners 3).

Every federal constitutional right cannot be bifurcated in the manner urged by defendants. The standard utilized in *Connick* involved a longstanding distinction in free speech caselaw; no such distinction is to be found in this Court's petition clause decisions. So long as an infringement of otherwise protected constitutional interests must be justified by some identified governmental interest, an assessment in each case of the importance of those interests does not have the drastic consequences of defendants' proposed per se rule. On the other hand, if the core of the petition clause can be held limited to matters of public concern, and non-core petitioning can be forbidden or the subject of constitutionally permissible reprisals, an equally plausible argument could be made for bifurcating other First Amendment rights.

The assembly clause might permit the dismissal of a government employee for attending a meeting about employment matters not of public concern and the free speech clause might permit the dismissal of a government employee for attending a trial about, or owning a book concerning, an employment matter not of public concern. An insistence on subdividing every constitutional guarantee would often if not invariably result in downgrading certain rights to a second class status in a manner that the framers never envisioned. It is difficult to imagine, for example, how the right of public employees to free exercise of religion could be divvied up. Surely the free exercise clause does not permit the dismissal of public employees if they are overheard praying about a work-related matter that is not of public concern.

IV. THE CORE RIGHTS PROTECTED BY THE PETITION CLAUSE ARE NOT LIMITED TO PETITIONS CONCERNING MATTERS OF PUBLIC CONCERN

(1) The essential purpose of the petition clause is to protect the right of a petitioner to seek redress. "[T]he very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002).

The history described above makes clear that in England and the colonies petitions regarding private matters were the very practice from which the right

to petition first arose. Such appeals for redress constituted the largest portion of the petitions which the Congress and the state legislatures were addressing at the end of the eighteenth century. Neither the Congress which framed the petition clause nor the state legislatures which ratified that constitutional guarantee would have imagined that a petition was less entitled to protection because that petition concerned, however urgently, only the particular individual who had submitted it.

(2) Defendants offer several accounts of the asserted "core" purpose of the petition clause, none of which provide a persuasive account of why the clause should be limited in this manner.

Defendants suggest, first, that the "basic" goal of the petition clause is "assur[ing] unfettered exchange of ideas." (Pet.Br. 38, 39) (quoting *Connick*, 461 U.S. at 145). But the petition clause is limited to petitions to "the Government." That clause is expressly inapplicable to an individual's efforts to exchange ideas with members of the public. A written submission to government officials that merely contained a detailed discussion on some matter of public concern, but that lacked any explicit or implicit request for redress, would not be within the scope of the petition clause. To the extent that petitions do convey ideas, the petitioner surely does not expect government officials to respond with their own views, initiating some sort of enlightening debate. A petition may elicit a response; a judge, for example, may rule on the merits of a lawsuit. But that judicial action would not

sensibly be described as some sort of "exchange of ideas" with the plaintiff.

Defendants argue in the alternative that the petition clause was adopted primarily because it is "necessary" to assure that members of the public, having discussed among themselves matters of public importance, will be free from reprisal when they communicate their ideas to government officials. (Pet.Br. 14). Thus the core purpose of the petition clause would be to safeguard the statements to government officials which, because of their audience, would somehow be unprotected by the free speech clause. But there is no such loophole in the free speech clause which the petition clause is "necessary" to fix. Defendants offer no explanation, and none is readily imaginable, why a statement about a matter of public concern, otherwise protected by the free speech clause, would not be equally protected if it were addressed to a government official.

Third, defendants suggest that the core purpose of the petition clause is to protect the ability of the public to express to government officials the "will" of "the people," thus assuring "democratic self-government." (Pet.Br. 17). It is primarily a mechanism "to register popular opinion with the government." (Pet.Br. 25). That core purpose assures that the government will be "responsive to the will of the people." (Pet.Br. 19) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). This proffered basic purpose would presumably be limited to petitions that convey the "will of the people" and thus

would not include petitions from individuals whose views conflict with the opinions of the majority, no matter how important the subject at issue. But the guarantee of the petition clause is not "primarily collective in nature." *District of Columbia v. Heller*, 554 U.S. 570, 579 n.5 (2008). If the petition clause rights of public employees were limited to this proffered core purpose, moreover, those rights would assuredly exclude petitioning directed to judges on any subject whatever, because the judiciary is charged with making its decisions based on law and evidence, not based on the will of the people.

Defendants' arguments misapprehend the distinctive role of the petition clause. The petition clause protects the right of an aggrieved individual to seek correction of his grievance. The standard by which a proffered grievance is justice,[36] not public opinion. That is why the protections of the petition clause are denied to baseless claims,[37] even if they enjoy widespread public support, but encompass meritorious claims that may be anathema to most people. The central purpose of a petition is not to convey an idea, or to spark a debate, but to obtain redress. Petitions,

---

[36] When the King received a petition of right, asserting that property in the hands of the crown was actually owned by the petitioner, he could refer the petition to court by endorsing it with the words "'soit droit fait al partie' (let right be done to the party)." 3 William Blackstone, Commentaries on the Laws of England *256 (St. George Tucker ed. 1803).

[37] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60 (1993).

of course, may well convey ideas; the letters in *McDonald* obviously did. But petitions are not merely – or primarily – a particular form of expression, like "expression to the President," "expression to a judge" or "expression on Mondays."

(3) Defendants rely on brief references to the history and purpose of the petition clause that were contained in this Court's decision in *McDonald v. Smith*. The particular question at issue in *McDonald*, whether the petition clause protects libelous statements in a petition, is not before the Court in the instant case, and we do not ask that it be reconsidered. But the account in *McDonald* of the origins and original purpose of the petition clause has been undermined by subsequent scholarship,[38] and does

[38] Julie Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth*, 21 HASTINGSCONST.L.Q. 15, 15-42 (1993); Eric Schnapper, *'Libelous' Petitions for Redress of Grievances – Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303 (1989); Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIOST.L.J. 557, 568 n.28 (1999); Norman Smith, *"Shall Make No Law Abridging ...": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U.CIN.L.REV. 1153, 1184-88, 1196-97 (1986); Stephen Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALEL.J. 142, 143 n.2, 166 (1986); Ronald Krotoszynski, *The Return of Seditious Libel*, 55 U.C.L.A.L.REV. 1239, 1306-08 (2008); Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 NW.U.L.REV. 739, 739 (1999); Note, *A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions*, 106 HARV.L.REV. 1111, 1114 (1993); James Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right To Pursue*

(Continued on following page)

not provide a sound basis for defendants' crabbed interpretation of the petition clause.

McDonald stated that the petition clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." 472 U.S. at 485. However, the use of petitions to obtain redress of grievances, and the recognition that such petitions should be protected from reprisal, predate by many centuries the ideas of freedom of speech and press and the emergence of democratic institutions. "The practice of petitioning the King for redress long antedated Magna Carta." Mark, 66 FORDHAM L. REV. at 2163. In 1215 Magna Carta the king recognized a right to petition, "grant[ing] to our subjects the following security," that if the charter were violated, or "if We, our justiciary, bailiffs, or any of our ministers offend in any respect against any man," representatives of the barons "shall come before Us ... declaring the offense, and shall demand speedy amends for the same." Magna Carta: Text and Commentary (A. E. Dick Howard ed.) 50. Assuredly neither King John nor any of the barons at Runnymede adhered to the ideals of democracy or believed in freedom of speech or freedom of the press. "[T]he right to petition emerged and was formed in a period before anything resembling modern notions of representative government gained

---

Judicial Claims Against the Government, 91 NW.U.L REV. 899, 905 (1997).

any prominence." Gary Lawson and Guy Seidman, *Downsizing the Right to Petition*, 93 NW.U.L.REV. 739, 755-56 (1999). "The right to petition emerged in England largely as a substitute for ... formal mechanisms of representation." *Id.* at 761.

As Magna Carta illustrates, the right to petition was widely recognized in England (and, later, in the colonies) long before the idea of freedom of speech had taken root in the law. In the seventeenth century the right to petition was expressly codified in a 1622 proclamation of King James I, the 1642 Massachusetts Body of Liberties, a 1669 resolution of the House of Commons, and the 1689 Bill of Rights. Smith, 54 U.CIN.L.REV. at 1157-60. Not one of these guarantees provided for freedom of speech or freedom of the press. To the contrary, even after the 1689 Bill of Rights the press in England and the colonies remained subject to licensing, and those who criticized the government (except in petitions) were still prosecuted for sedition well into the eighteenth century.

> On February 24, [1702] the House [of Commons] passed two resolutions: first, that the people have a right to petition the king for redress of grievances, and second, that it is an offense to publish any writings "reflecting upon the proceedings of parliament or any member thereof...." These two resolutions highlight the opposite values placed on petition and press at the time; the right to petition was protected, and the press was rigorously suppressed.

Id. at 1165 (footnotes omitted)

"Under English common law and statute, only documents that qualified as petitions were protected from formal political retaliation by governmental authorities." Mark, 66 FORDHAML.REV. 2201.

> Historically, the right to petition was a distinct right, superior to other expressive rights.... When the English government first began to speak of petitioning as an 'inherent right' of citizens, the rights of speech, press, and assembly were regulated. Petitioners were not punished (as they would have been under the regulations specifically directed to speech, press, and assembly).

Julie Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth*, 21 HASTINGSCONST.L.Q. 15, 17-20 (1993). At the 1688 trial of the *Seven Bishops Case* the court emphatically rejected the prosecution's contention that a petition was entitled to no greater protection than a book; only petitioning, they insisted, was "the birthright of the subject."[39] Both in England and in the colonies petitioners carved out a greater degree of protection for expression by "expand[ing] the notion of what the meaning of a grievance was, so that a petition seeking a redress of a grievance often became more than a request for an individual remedy or plea for assistance." Gregory Mark, *Right to Petition*, in 5 Encyclopedia of the American Constitution (2d ed. L. Levy and K. Karst eds.) at 2272 (2000).

---

[39] 12 Howell State Trials 419-20 (Holloway, J.).

(4) Defendants suggest that, whatever the meaning and purpose of the right to petition under English law, it acquired a new essence and scope when incorporated into the Constitution. The fatal defect in the Third Circuit opinion in *San Filippo*, they argue, was that it "considered *only* what 'the right to petition ... was intended to mean in England three centuries ago.'" (Pet.Br. 22 (emphasis added) (quoting *San Filippo*, 30 F.3d at 443)). Subsequent developments in America, defendants imply, gave the right a new and narrower meaning. But only the most compelling circumstances could establish that the framers of the Bill of Rights intended that any of its provisions would provide a lesser guarantee of liberty than the colonists had enjoyed under English law. Precisely to the contrary, the petition clause safeguards the "right" to petition the government, clearly referring to an already recognized liberty, not constructing some new and possibly more restricted version.

Defendants suggest that the framers tacitly narrowed the scope of the right to petition by including the petition clause in the same amendment as the free speech clause. (Pet.Br. 17). But in the earlier drafts of the Bill of Rights the petition clause and the free speech clause were in separate provisions, as they were in all of the state constitutions and bills of rights of the era. It is difficult to believe that the framers intended to limit the scope of the petition clause, without any relevant alteration in the actual words of the clause itself, simply by grouping it with

the other five guarantees of the First Amendment. Surely the state legislatures which ratified that Amendment could not have understood that such a change was intended.

V. SECTION 1983 ACTIONS ARE PROTECTED BY THE PETITION CLAUSE

(1) Of the two petition clause claims asserted by Guarnieri, defendants voice particular objection to the claim that he was protected by the petition clause when he filed his original section 1983 action in federal court. Defendants object at length to the burdens that they assert such lawsuits, if protected by the petition clause, would impose on public employers. (Pet.Br. 13, 41-43, 51). Employers could escape those burdens, defendants suggest, if the petition clause were not construed to bar reprisals against the workers who seek redress by filing section 1983 lawsuits; in the absence of such a prohibition, public employers would be able to avoid the harshness of this redress mechanism by employing the threat or use of reprisals to deter their workers from filing such burdensome section 1983 suits against government officials or bodies.

Despite the fact that defendants are contending that the petition clause permits them to retaliate against plaintiffs because they sought to enforce federal rights in a court of the United States, the Solicitor General supports their position. The government's brief identifies as the concern of the United

States in this case only its interest as "the nation's largest public employer." (U.S.Br. 1). The Solicitor General expresses no similar interest in whether individuals who seek to enforce federal rights in federal courts will be subject to reprisals. Like defendants, the government asserts that "the central purpose of the Petition Clause was access to the legislature." (U.S.Br. 17 n.5).

(2) The decisions of this Court emphatically establish that the petition clause applies to the judicial branch of the government, and thus encompasses a right of access to the courts. "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). "The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts ... for redress of alleged wrongs.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (quoting *Bill Johnson's Restaurants*). "[A] complaint in court is a form of petitioning activity." *McDonald v. Smith*, 472 U.S. 479, 484 (1985). "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

In questioning the importance under the petition clause of petitions directed to the courts, the United States and defendants rely on a statement by James Madison, which the Solicitor General describes as

"stating that [the] Petition Clause was designed to protect the peoples' right to apply 'to the Legislature by petitions, or remonstrances, for redress of their grievances.'" (U.S.Br. 17 n.5; see Pet.Br. 40 n.7). What the government is quoting, however, is not an explanation of the petition clause that Congress actually adopted, but the substance of Madison's own unsuccessful proposal for a much narrower petition clause, a proposal that by its terms would have applied only to petitions "to the Legislature."[40]

Congress, however, rejected this more restricted draft. Representative Sherman successfully urged instead that the right to petition be expanded to include petitioning the "government."[41] On July 28, 1789 the Select Committee proposed the broader language that became the House version of the petition clause. "The ... right of the people to ... apply to *the government* for redress of grievances, shall not be infringed." 2 Schwartz at 1122 (emphasis added). The expansion of the petition clause to include petitions to "the government" departed both from Madison's proposal and from the terms of the contemporaneous state petition clauses. "The text and drafting history

---

[40] The quoted words are preceded by Madison's statement that "[t]he amendments which have occurred to me, proper to be recommended by Congress to the State Legislatures, are these." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971).

[41] Helen E. Veit, et al., Creating the Bill of Rights, The Documentary Record from the First Federal Congress 266-68 (1991).

make clear that the framers of the Petition Clause ... deliberately chose to broaden the clause to encompass submissions not only to the Congress ... but also to the executive and judicial branches of the federal government." Pfander, 91 NW.U.L.REV. at 900. "Unlike all of its state predecessors, the Petition Clause speaks of the right to petition the 'government,' not the legislature, for a redress of grievances.... [T]he reference to 'Government' ... conveys a[ ] ... clear[ ] three-branch message." *Id.* at 956.

The decision of the framers to include all branches of the government in the petition clause was consistent with the history of petitioning in England and with the scope of petitioning that was common in the colonies. Although petitions at the time of Magna Carta were directed only to the King, as courts emerged in the later Middle Ages it became increasingly common for the King, and the Parliament, to refer petitions to those courts for resolution. Petitions were often forwarded to the Lord Chancellor, the King's advisor, for a recommendation; over time the Chancellor acquired the authority to decide those petitions on his own, and from that practice the Court of Chancery emerged. In many cases proceedings in the courts were styled as petitions to the King.[47] In the

---

[47] This history is summarized in Carol Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIOST.L.J. 557 (1999), James Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right To Pursue Judicial Claims Against the Government*, 91 NW.U.L.REV. 899 (1997), and Julie

(Continued on following page)

United States in 1789 many legal proceedings were commenced with a pleading entitled a petition, a practice that continues to this day in petitions for habeas corpus and for a writ of mandamus.

(3) Defendants strongly object to according constitutional protection to petitions directed to the courts, insisting that use of the courts is a particularly draconian method for redressing grievances. Consideration of petitions in the courts, they contend, intimidates and distracts government officials, imposes exorbitant costs, and stirs up divisiveness. (Pet.Br. 13, 41-43, 51). The United States adds that lawsuits burden the government because they require a response, and because "public lawsuits ... are matters of public record." (U.S.Br. 20 (quoting *San Filippo*, 30 F.3d 449 50 (Becker, J., dissenting)). Petitions seeking judicial redress, both warn, may well be worse than mere speech. (U.S.Br. 20; Pet.Br. 13, 41).

But redress through the courts is the mechanism that Congress selected in 1871 to remedy violations of federal constitutional rights by state officials. The judicial redress provided by section 1983 replaced over time the quick, efficient, cost-free – but surely more intrusive – justice that was being meted out during Reconstruction by the Union Army stationed across the South. It would be wholly impractical for

---

Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut From A Different Cloth*, 21 HastingsConstLQ 15, 43-49 (1993).

Congress to provide redress for constitutional violations by holding individualized hearings, and enacting private bills, for every claim asserting a violation of federal rights. Neither defendants nor the Solicitor General suggest how, other than by lawsuit, Congress could provide redress for Guarnieri's grievance-based retaliation claim or for other violations of federal constitutional rights.

Defendants argue that the redress mechanism provided by section 1983 is an affront to federalism. (Pet.Br. 52, 57). Precisely to the contrary, when as in the instant case an individual contends that his federal rights (here the asserted petition clause right to seek redress for the grievance-based retaliation) have been violated, it is entirely appropriate that Congress should create a federal cause of action in section 1983 and provide for federal subject matter jurisdiction in 28 U.S.C. §§1331 and 1343.

Defendants object to several aspects of the particular remedial scheme associated with section 1983. They complain that section 1983 actions can be brought against individual officials who often enjoy only qualified, but not absolute immunity; such individual liability, defendants argue, may distract and intimidate government officials. (Pet.Br. 41). Defendants argue that if the petition clause protects lawsuits, claimants will be encouraged to bypass less formal mechanisms for resolving disputes. (Pet.Br. 32, 41). Section 1983 itself indeed permits plaintiffs to file suit without exhausting administrative remedies. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496

(1982). Defendants take particular umbrage at the decision of Congress to enact the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, which authorizes awards of counsel fees to successful section 1983 plaintiffs. (Pet.Br. 10-11, 43). But Congress was empowered by section 5 of the Fourteenth Amendment to make all of these choices in fashioning a remedial mechanism to redress violations of federal constitutional rights.

None of these objections, moreover, has any apparent connection to the question before the Court. If, as defendants and the United States contend, lawsuits are a particularly harsh method of providing redress for the grievances of petitioners, and perhaps for that reason less deserving of constitutional protection, the magnitude of the burden on government defendants assuredly is not somehow greater when the subject of the lawsuit is a matter of interest only to the litigants. To the contrary, insofar as the defendants object that lawsuits can be divisive, and insofar as the United States objects that lawsuits and trials are public, those asserted problems are assuredly greater when a lawsuit involves a matter of public concern.

VI. THE PETITION CLAUSE APPLIES TO AN ARBITRAL FORUM AUTHORIZED BY THE GOVERNMENT TO PROVIDE REDRESS

The collective bargaining agreement signed by the Borough and the police officers provided that

those officers, including Guarnieri, could only be dismissed for "just cause." Absent some contrary provision, that contractual agreement would have been enforceable in the courts. The petition clause would have protected Guarnieri if he had sought judicial redress for a violation of that agreement.

Under the terms of Article 16 of the 2003 collective bargaining agreement, however, the parties provided that redress for a violation would instead be provided by an arbitrator selected by Borough officials and the grievant. If a police officer sought redress under Article 16 for an asserted violation of the agreement, the parties agreed that the decision of the arbitrator would be "final and binding."

In these circumstances Guarnieri's grievance and request for arbitration were a petition to "the government" for redress. It was the Borough of Duryea which, by signing the collective bargaining agreement, empowered the arbitrator to provide redress to Guarnieri. By agreeing that the decision of the arbitrator would be "final and binding on the parties," the Borough conferred on the arbitrator authority to determine the actions of city officials. In this case the ultimate power to decide whether Guarnieri would be restored to his government position as Chief of Police, the Borough agreed, was to rest in the hands of the arbitrator. This delegation of municipal authority is expressly authorized by Pennsylvania statutes.[43]

---

[43] 42 Pa Cons Stat. §§7302(b), 7302(d)(1)(ii), 7303

Where, as here, the government has "delegated its authority to [a] private actor," thus conferring on that individual the "mantle of authority" to determine how the government itself will act, that individual is a government actor for constitutional purposes. *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988); see *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 625 (1991) ("If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate.").

Defendants object that the arbitral forum was not a court. (Pet. Br. 27-28). But the petition clause does not merely protect the right to petition the courts, or the courts and legislature, for redress of grievances. The clause safeguards the right to protect "the government" for such redress. It is true, of course, that the framers of the Bill of Rights were not familiar with modern arbitration as a method of providing redress, just as they were unfamiliar with any number of other redress mechanisms and modes of government, such as administrative law judges, that have been devised over the course of the centuries following the adoption of the Bill of Rights. But the protections of the petition clause are not limited to government institutions as they existed in 1789; they apply to the government, however its institutions may over time grow and change. The history of petitioning during the centuries that preceded the adoption of the First Amendment was one of ongoing evolution. What began as petitions directed only to

and determined solely by the King himself evolved into petitioning that was directed to and resolved by royal officials, then by Parliament, then by triers appointed by Parliament, and ultimately by a succession of courts. The protection accorded the right to petition followed the development of these emerging institutions. The framers cannot be assumed to have intended that new modes of governmental redress that might be fashioned in the years ahead would fall outside of protections of the petition clause.

The defendants object that "[s]imply arbitrating Guarnieri's first grievance cost Duryea $30,000 in legal fees." (Pet Br. 43) (emphasis omitted). If the Borough, unconstrained by the petition clause, were free to retaliate against any employee who resorted to arbitration, few if any current employees would do so, thus saving Duryea such litigation costs. But those costs are a consequence of the choice that Duryea itself made when it agreed that disputes arising under the collective bargaining agreement would be resolved by arbitration. Presumably the city thought that a prudent choice, compared to the time and expense that would be involved if disputes under the contract were resolved (as they might have been absent Article 16) in court.[*] "By agreeing to arbitrate

---

[*] As part of the agreement that provided for resolving contract disputes by arbitration, the Duryea police officers agreed that they would not seek to resolve such disputes by means of a strike or "slow down" (P Ex. 41 p. 32), a provision clearly to the Borough's advantage.

. . . , a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see *id.* at 633 ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate disputes."). Perhaps the Borough in retrospect should have devised, and obtained agreement to, some remedial mechanism even more efficient that arbitration. But having itself selected arbitration in 2003 as the method for resolving disputes under the contract, and for providing redress to aggrieved police officers, the Borough cannot reasonably insist that it should be able to use reprisals to prevent use of the very remedial mechanism that government itself fashioned and empowered.

The Court need not in this case delineate all the circumstances in which a public employee's invocation of a redress mechanism would be sufficiently distinct from an ordinary internal complaint to be protected by the petition clause. If the Court undertakes to do so, it should hold that a public employee engages in action protected by the petition clause when that employee (1) seeks redress from an entity or individual, such as a court, arbitrator, or administrative agency, that is authorized to provide redress and that is distinct from the employing agency, (2) seeks redress from a reviewing entity or individual of a decision by the employing agency that has become

final for purposes of the statute of limitations, see *Ricks v. Delaware State College*, 449 U.S. 250, 261 (1980), or (3) seeks redress in a process in which the government has provided that the employee may be represented by an attorney or other individual. The petition clause necessarily applies to any step which is a prerequisite to a particular constitutionally protected form of petitioning, such as the filing of a notice of claim. On the other hand, an employee's actions are not protected if the claim at issue lacked a reasonable basis.

VII. UPHOLDING GUARNIERI'S PETITION CLAUSE CLAIM WILL NOT UNDERMINE *CONNICK*

Interpreting the petition clause to provide greater protections than the free speech clause, defendants predict, will lead to a litigation tsunami of biblical proportions. Such a construction of the petition clause would "dramatically increase the volume ... of public employment litigation" (Pet.Br. 36), trigger "an onslaught of ... litigation," cause federal claims to "expand exponentially" (Pet.Br. 48), and "open the federal floodgates" (Pet.Br. 48) (quoting *Altman v. Hurst*, 734 F.2d 1240, 1244 (7th Cir.1984)). These are the dire consequences that "will" (Pet.Br. 13, 48) and "would" (Pet.Br. 36, 42) follow from adoption of the rule in *San Filippo v. Bongiovanni*. But *San Filippo* was decided more than sixteen years ago. Defendants do not contend that such a tidal wave of petition clause claims ever actually occurred in the Third Circuit. Predicting in 2011 the dire consequences of

the 1994 decision in *San Filippo* is like warning today of the Y2K computer collapse that will occur on New Year's Day 2000.

Defendants also assert that under *San Filippo* a public employee could readily evade the limitations of *Connick* through the "contrivance" of recasting any workplace gripe as a lawsuit or other form of petitioning. (Pet.Br. 48). But defendants do not identify any body of post-*San Filippo* litigation in the Third Circuit that involved such contrivances. They certainly do not advance that argument about the instant case. Guarnieri filed his 2003 grievance for the simple reason that he had lost his job and wanted it back, not because the grievance was a clever way to express the fact that he did not like being fired.

It is easy to understand why *San Filippo* has not had the grave consequences predicted by defendants. Public employees cannot, as defendants suggest, easily recast every "garden-variety public employment dispute" as a federal or state court claim. Most such disputes simply are not actionable. Public employees do not have the funds to hire lawyers to file lawsuits, and no sensible attorney would agree to litigate on a contingent fee basis a lawsuit that lacks any realistic chance of success. Some non-actionable disputes might provide a basis for a grievance under a collective bargaining agreement, but many employees are not covered by such agreements and often it would be impracticable or impossible to pursue a grievance without the support of the union in question. If grievance procedures were being misused in the manner described by defendants, public employers would have been in a position to modify them

to end that problem. A worker who, as defendants suggest, merely relabeled a gripe as a lawsuit or grievance, heedless of the lack of plausibility of that complaint under the applicable law or collective bargaining agreement, would not have been protected by *San Filippo*.

If a worker in the Third Circuit actually had no interest in the redress that a lawsuit or grievance might provide, he or she would be unlikely to initiate such a lawsuit or grievance simply because doing so would be protected by *San Filippo*. Defendants' argument mistakenly assumes that numerous government employees are vexatiously seeking a forum – other than discussions with friends and family – in which to vent with impunity personal gripes about their jobs. But in the instant case Charles Guarnieri was not the Julian Assange of northeastern Pennsylvania, looking for a devious way to leak the surprising secret that the former Police Chief of Duryea did not like getting fired. Mr. Guarnieri was a responsible law enforcement officer using the redress mechanisms provided by the Borough of Duryea and by the Congress to obtain the reinstatement and damages to which an arbitrator and a federal jury, respectively, concluded he was entitled.

CONCLUSION

In addition to arguments limited to the specific issue in this case, the government advances a far more sweeping contention. The Solicitor General insists that the Constitution should not be construed

in a way that confers upon public employees rights that reach "far beyond those enjoyed by their privately employed counterparts." (U.S. Br. 20). Such a principle of constitutional interpretation would call into question many of the constitutional rights of federal, state and local government workers, because employees in the private sector do not themselves enjoy any constitutional protections at all. On the government's view the meaning of the Bill of Rights would expand and contract to remain in line with whatever statutory rights were from time to time granted or denied to private employees. There are few if any statutory provisions, for example, that protect private employees from dismissal for opposing intrusive searches or accord them any procedural rights prior to termination. If the government's position were adopted, virtually all existing constitutional rights of government employees would have to be reconsidered to assure that they did not unduly exceed the statutory rights accorded to private workers.

Defendants offer a similarly expansive contention. State and federal statutes, they note, provide only partial prohibitions against reprisals. Pennsylvania law, for example, prohibits only certain retaliatory motives, forbids only particular methods of reprisal, and provides differing protections depending on the job of a public employee and the government body for which he or she works. (Pet.Br. 54-58). Federal statutes forbid reprisals against many, but not all, federal workers. Defendants contend that the petition clause – and, presumably, the entire Bill of

Rights – must defer to these legislative choices, and should not be construed to forbid types of reprisals, or to protect individuals, that the state or national legislation does not reach. On this view petition clause rights that existed when the clause was adopted in 1791, and when the Fourteenth Amendment was ratified in 1868, subsequently disappeared when state and federal legislation came to accord public employees significant, but in some respects less complete protections.

Both of these far reaching contentions are clearly incorrect. The scope of the rights guaranteed by the Constitution does not depend on the ever varying federal and state statutory provisions regarding the rights of private worker and public employees.

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

CYNTHIA L. POLLICK
363 Laurel Street
Pittston, PA 18640
(570) 654-9675

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@u washington edu

Counsel for Respondent

**Counsel of Record*